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No. 86-1855

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DELTA AIR LINES, INC. and WESTERN AIR LINES, INC.,
Petitioners,
v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION, and LOCAL UNION NO. 2707, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and LOCAL UNION NO. 2747, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and AIR TRANSPORT EMPLOYEES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR TEAMSTER RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a grievance over the alleged premerger breach of a collectively bargained successorship clause, which is lodged with and seeks relief only from the signatory employer, is an arbitrable "minor" dispute under the Railway Labor Act.

2. Whether a federal district court has jurisdiction to compel the signatory employer to submit to arbitration of a grievance over the alleged premerger breach of a successorship clause before a system board of adjustment, where the system board is not called upon to designate a representative for postmerger employees.

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BRIEF FOR TEAMSTER RESPONDENTS IN OPPOSITION

Respondents, International Brotherhood of Teamsters, Airline Division ("IBT") and Teamsters Local 2707 and 2747, respectfully urge denial of the petition for a writ of certiorari to review the judgment and orders entered by the United States Court of Appeals for the Ninth Circuit on March 30 and April 1, 1987.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.[1]

STATUTORY PROVISIONS INVOLVED

Certain provisions of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, are set forth in the appendix to the petition (Pet. App. M). Sections 152, First and 204 of the RLA, 45 U.S.C. §§ 152, First, 184, are set forth in the appendix to this opposition brief. Resp. App. A.

STATEMENT OF THE CASE

Relevant Facts

On September 1, 1984, IBT and Western Airlines, Inc. ("Western") signed a Letter of Agreement, which provided that in the event of an unfriendly takeover effort, as determined by the IBT, Western would require the acquiring carrier to assume the obligations of the IBT collective bargaining agreements.[2] Western agreed to this provision as part of the *quid pro quo* for employee wage and work rule concessions which reduced Western's labor costs by 20 percent.

On September 9, 1986, Western and Delta Air Lines, Inc. ("Delta") entered into an Agreement and Plan of Merger ("Merger Agreement"). The Merger Agreement did not condition Western's acquisition on Delta's assumption of Western's collective bargaining agreements with the IBT. On or about October 15, 1986, the IBT notified Western that the IBT had determined that Western's

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[1] References to the petition are designated "Pet."; references to the appendix to the petition are designated "Pet. App."; and references to the appendix to this opposition brief are designated "Resp. App."

[2] The Letter of Agreement is reprinted at Resp. App. B.

acquisition by Delta was "unfriendly," and the September 1, 1984 Letter of Agreement was applicable to the transaction. The IBT thus demanded compliance with the Letter of Agreement, and reiterated its demand by letter dated October 27, 1986. On October 30, 1986, Western denied that the Letter of Agreement applied to the Merger Agreement.

On or about November 6, 1986, the IBT filed class action grievances with Western on behalf of each craft or class of employees it represented at Western.[3] The grievances alleged that Western had breached the September 1, 1984 Letter of Agreement by failing and refusing to require Delta to assume the IBT collective bargaining agreements as a condition of acquisition. The relief requested was for the merger not to be effectuated until Western complied with the terms of the Letter of Agreement. The IBT asked Western to agree to refer the grievances directly to the system board of arbitration, which the IBT and Western established to resolve, *inter alia*, disputes arising out of the interpretation or application of the terms of their bargaining agreements.[4]

Western denied the IBT's grievances on November 13, 1986, and also declined to proceed directly to arbitration. At the Company's insistence, the grievances were referred to the Review Board, which constituted the final step of the grievance procedure before arbitration. The Review Board was comprised of equal numbers of IBT and Western representatives. On November 25, 1986, the

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[3] The IBT represented three crafts or classes at Western: Mechanics and Related Employees, Stock Clerks and Flight Instructors. The three crafts were covered by separate collective bargaining agreements having virtually identical grievance-arbitration provisions. The Letter of Agreement of September 1, 1984, relating to successorship, Resp. App. B, was applicable to all IBT-represented employees.

[4] The arbitration provisions of the bargaining agreements are set forth in pertinent part at Resp. App. C.

Review Board considered the IBT's grievances and deadlocked. The IBT immediately referred the grievances to the IBT-Western system board of arbitration, which is chaired by an impartial arbitrator selected by the parties. Western, however, refused to arbitrate the grievances.

The Proceedings Below

On December 5, 1986, the IBT instituted an action in the United States District Court for the Central District of California to compel Western to arbitrate the IBT's grievances. An order enjoining the merger of Western into Delta pending the outcome of arbitration was also sought.[5] Temporary relief was denied. On December 29, 1986, the IBT filed a motion for summary judgment, and Western and Delta filed a motion to dismiss the complaint, or alternatively for summary judgment. The district court denied the IBT's unopposed motion to expedite responsive briefing and oral argument. Adhering to its normal schedule, the lower court took the matter under submission solely on the papers submitted and without oral argument. On February 13, 1987, the IBT's complaint was dismissed.

The IBT noticed its appeal to the Ninth Circuit Court of Appeals on February 20, 1987. A motion to expedite the appeal filed by the IBT on March 2, 1987 was construed by the court of appeals as a motion for an order compelling arbitration pending appeal. So construed, the motion was granted on March 17, 1987.[6] The appeal was expedited by an order entered on March 20, 1987.[7] On

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[5] So all necessary parties would be before the court, Delta was made a defendant pursuant to Fed. R. Civ. P. 19.

[6] Arbitration commenced on March 30, 1987, before the IBT-Western system board of adjustment chaired by Robert O. Harris, formerly Chairman of the National Mediation Board, and was completed, but for closing arguments, on March 31.

[7] The appeals court also consolidated the IBT's appeal with the appeal filed by the Air Transport Employees ("ATE"). The IBT and the ATE are collectively referred to hereafter as "the Unions."

or about March 25, 1987, the IBT moved to enjoin the scheduled April 1, 1987 merger pending appeal. On March 27, 1987, Western and Delta filed a consolidated opposition to the IBT's motion to enjoin the merger pending appeal.[8]

A panel of the appeals court heard oral argument on March 30, 1987. The following day, the court of appeals issued an order which reversed the district court, directed Western to arbitrate the Unions' grievances, and enjoined the merger of the carriers "pending completion of arbitration proceedings. . . ." Pet. App. B-1. On April 1, 1987, the court below issued its opinion (Pet. App. A-1), which was amended on June 1, 1987 (Resp. App. E-1).

In concluding that the Unions' grievances were arbitrable minor disputes, the court of appeals reasoned that the "arbitration is not likely to make a determination that any union or unions will become the representative of Delta employees . . ." because "the unions are not seeking a determination that they are the collective bargaining representative of Delta employees . . . . Instead, the Unions seek a determination that Western breached its agreement by agreeing to a merger with an airline that did not agree to voluntarily recognize the Unions." Pet. App. at A-7. Noting that the Unions' "action seeks arbitration with Western, not Delta" (Pet. App. at A-7), the court of appeals "expressly decline[d] to decide whether the arbitrator can validly order representation by any union" because "[i]t is the function of the arbitrator, not the courts, to decide the meaning of the contract and to consider appropriate remedies in the first

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[8] Also on March 27, Western issued a memorandum to "all employees" which stated that "we [Western] have put together a contingency plan that will permit Western to continue to operate as an independent, wholly-owned subsidiary [of Delta] subsequent to April 1." A copy of this memorandum was filed with the court of appeals on March 30, 1987.

instance." Pet. App. at A-9. Relying on *Bhd. of Locomotive Eng'rs* v. *Missouri-K.T. R.R.*, 363 U.S. 528, 531 (1960), the appeals court considered it appropriate to "preserve the status quo so that such arbitration may proceed under the RLA" (Pet. App. at A-9, -10), and enjoined the merger pending the outcome of arbitration.

The Proceedings Before This Court

On April 1, 1987, Justice O'Connor, as Circuit Justice for the Ninth Circuit, granted Western's and Delta's emergency application for stay of the order of the Court of Appeals for the Ninth Circuit. Pet. App. G-1. On April 2, 1987, Justice O'Connor issued an amended order which stayed the ongoing arbitration between the IBT and Western, and the scheduled arbitration between ATE and Western. Pet. App. H-1.

REASONS FOR DENYING THE WRIT[9]

I. THE DECISION OF THE COURT BELOW, CONCLUDING THAT AN ARBITRABLE MINOR DISPUTE EXISTED, FOLLOWS THIS COURT'S ESTABLISHED PRECEDENTS, AND IS CONSISTENT WITH THE RAILWAY LABOR ACT.

A. Only A System Board Of Adjustment Has Jurisdiction Over Minor Disputes; The Dispute Over The Successorship Clause Is A Minor Dispute.

In directing Western to arbitrate the IBT's successorship grievances before the system board of adjustment, the court below adhered to this Court's decisions and the decisions of other courts of appeal. Thus, it has long been recognized that when a dispute involves the interpretation or application of a collective bargaining agree-

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[9] Although Western was merged into Delta on April 1, 1987, by virtue of Justice O'Connor's stay order, the IBT respectfully submits that the Court must consider the petition for certiorari in the same factual context as the court of appeals, i.e., when Western and Delta were separate operational entities.

ment, § 204 of the RLA, 45 U.S.C. § 184, mandates that it be referred to an appropriate adjustment board for resolution through arbitration. *Int'l Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 687-89 (1963); *Int'l Ass'n of Machinists* v. *Aloha Airlines*, 776 F.2d 812, 815 (9th Cir. 1985). *See Bhd. of R.R. Trainmen* v. *Chicago River & I.R.R.*, 353 U.S. 30, 38-39 (1957). The jurisdiction of the adjustment board to resolve these so-called "minor disputes" is exclusive.[10] *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320, 322-23 (1972) (Rehnquist, J.); *Int'l Ass'n of Machinists* v. *Republic Airlines, Inc.*, 761 F.2d 1386, 1390 (9th Cir. 1985).

As the court of appeals recognized, the IBT's grievances arise under an express term of its collective bargaining agreements with Western, as amended by the September 1, 1984 Letter of Agreement. The dispute with Western is entirely over the interpretation or application of the Letter of Agreement wherein Western, as a result of free collective bargaining, voluntarily agreed to "require the merging . . . or acquiring carrier or other entity to assume the obligations of the IBT collective bargaining agreements." Resp. App. B. The IBT's grievances were lodged against Western before the merger, concerned Western's failure to take premerger actions required by the Letter of Agreement, and sought to vindicate employee rights which had accrued prior to the acquisition and merger. Unquestionably, it was a premerger dispute between Western and its employees over the meaning or application of contractual terms.

Because the IBT-Western system board has exclusive jurisdiction over all "disputes or grievances of any employee or employees or disputes or grievances between the

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[10] A "minor dispute" is a dispute between the carrier and its employees over the meaning or application of an existing bargaining agreement's terms and deals with rights previously accrued. *Elgin, J. & E. R.R.* v. *Burley*, 325 U.S. 711, 723 (1945); *Aloha Airlines*, 776 F.2d at 812.

Company and the Union which may arise under the terms of [the IBT-Western] Agreement . . ." (Resp. App. C), the court below correctly concluded that a minor dispute existed. The matter was properly referred to the system board for resolution.[11] *Accord, Teamsters Local 70* v. *Western Pacific R.R.*, 809 F.2d 607 (9th Cir. 1987); *Airline Pilots Ass'n* v. *Texas Int'l Airlines*, 567 F. Supp. 66, *motion for stay denied*, 567 F. Supp. 78 (S.D. Tex. 1983); *Ass'n of Flight Attendants* v. *Republic Airlines, Inc.*, 86 C 3164 (N.D. Ill. June 11, 1986) (Resp. App. D).

Precedent arising under the NLRA[12] was properly considered by the court below because the issue of whether a minor dispute arises from a grievance over a successor-

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[11] The test applied by the court below in determining whether the IBT's grievances constituted a minor dispute—whether the dispute was "arguably covered" by a contract term—is in accord with *Communications Workers* v. *AT&T Technologies*, 106 S.Ct. 1415 (1986), and the decisions of other circuit courts of appeal. The Court of Appeals for the Fifth Circuit has employed the same test as the court below. *REA Express, Inc.* v. *Ry. Clerks*, 459 F.2d 226 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972). Other circuit courts have found the existence of a minor dispute where the claim that the contract permits the disputed action is not "obviously insubstantial," *UTU* v. *Penn Central Transp. Co.*, 505 F.2d 542 (3d Cir. 1974); *UTU Local 1477* v. *Baker*, 482 F.2d 228 (6th Cir. 1973); *Airline Stewards Ass'n* v. *Caribbean Atlantic Airlines, Inc.*, 412 F.2d 289 (1st Cir. 1969); *Southern Ry Co.* v. *Bhd. of Locomotive Firemen*, 384 F.2d 323 (D.C. Cir. 1967); the contract is "reasonably susceptible" to the interpretation sought, *UTU* v. *Burlington Northern, Inc.*, 458 F.2d 354 (8th Cir. 1972); and the asserted contractual claim is not frivolous, *UTU* v. *Baker*, 499 F.2d 727 (7th Cir.), *cert. denied*, 419 U.S. 839 (1974).

[12] Successorship clauses have received the tacit approval of this Court. *Howard Johnson* v. *Detroit Local Jt. Exec. Bd.*, 417 U.S. 249, 258 n.3 (1974). In cases arising under the NLRA, successorship clauses have withstood attacks of being unlawful, and have been deemed to be mandatory subjects of bargaining. *Lone Star Steel Co.* v. *NLRB*, 639 F.2d 545 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981); *Amax Coal Co.* v. *NLRB*, 614 F.2d 872 (3d

ship clause does not require statutory interpretations that are unique to the RLA. *Bhd. of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). *See Textile Workers* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 458-59 (1957). Section 9 of the NLRA was modeled on § 2, Ninth of the RLA. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937).[13] Moreover, "since the compulsory character of the administrative remedy provided by the Railway Labor Act for [minor] disputes . . . stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the [Labor-Management Relations Act, 29 U.S.C. § 185]." *Louisville & N.R.R.*, 406 U.S. at 323. Accordingly, under the RLA, more so than under the LMRA, "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT&T*

Cir. 1980), *rev'd in part on other grounds*, 453 U.S. 322 (1981). The courts of appeal have compelled arbitration of successorship clauses in suits brought under § 301 of the LMRA. *See Local Jt. Exec. Board* v. *Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3468 (Jan. 13, 1987); *Int'l Ass'n of Machinists, Local 1226* v. *Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981). Findings that employers have breached successorship clauses substantially identical to the Letter of Agreement have been enforced by the courts. *See United Mine Workers, District 17* v. *Allied Corp.*, 765 F.2d 412 (4th Cir.) (en banc), *cert. denied*, 105 S.Ct. 3527 (1985); *TTL Distribution, Inc.* v. *Local 99, ILGWU*, 551 F. Supp. 649 (S.D.N.Y. 1982), *aff'd without opinion*, 729 F.2d 1444 (2d Cir. 1983); *UMWA* v. *Eastover Mining Co.*, 603 F. Supp. 1038 (W.D. Va. 1985). And, arbitration of breaches of such clauses is common. *See Martin Podany Associates*, 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.); *Sexton's Steakhouse, Inc.*, 76 Lab. Arb. (BNA) 577 (1981) (Ross, Arb.).

[13] *Compare* § 2, Ninth *with* § 9(c) of the original Wagner Act, 49 Stat. 453 (1935).

Technologies, 106 S.Ct. at 1419, *quoting Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).[14]

B. Arbitration Of A Successorship Clause Does Not Give Rise To A Representation Dispute, For The Arbitrator Is Not Called Upon To Determine A Collective Bargaining Representative Or The Appropriate Craft Or Class Of Employees.

A representation dispute is not implicated by the IBT's grievance alleging a breach of the successorship clause set forth in the 1984 Letter of Agreement. *Air Line Pilots Ass'n* v. *Texas Int'l Airlines*, 567 F. Supp. 66; *Ass'n of Flight Attendants* v. *Republic Airlines, Inc.*, 86 C 3164 (Resp. App. D). A representation dispute involves the proper determination of who shall have the right to represent a given class or craft of employees for purposes of the RLA by virtue of their majority status. *Texas Int'l Airlines*, 567 F. Supp. at 70.

In contrast, a successorship clause operates "to assure that successorship would be required before any contract of sale was made, to assure that signatories to the agreement would pass their obligations on to the purchasers. . . ." *Eastover Mining Co.*, 603 F. Supp. at 1044. The clause affects only the postmerger terms and conditions of employment of the seller's employees and does not, after the merger or sale, extend coverage of the contract or recognition of the union to any but the seller's employees. *Amax Coal*, 614 F.2d at 886-87; *Eastover Mining*, 603 F. Supp. at 1047. *See John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 551 n.5 (1964).

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[14] Delta suggests that its voluntary assumption of LPP's obviates the need to comply with the successorship clause. While a dubious proposition at best, Delta's LPP's do not address the issue of who will represent the employees on the acquired carrier (Western) in enforcing LPP rights, or even whether such rights are enforceable at all.

No representation dispute arose by virtue of the IBT's grievances because they did not constitute demands on Delta to recognize the IBT as the representative of any of its employees. Nor, as the court below stated, were they demands for recognition against Western. Pet. App. A-7. The IBT already represented Western's employees.

Delta suggests that it is appropriate for the judiciary to "look beyond the superficial form of a complaint to determine whether . . . it masks a representation dispute." Pet. at 10-11. But, neither federal nor state courts have jurisdiction to interpret collective bargaining agreements subject to the RLA, even when it is necessary to resolve cases otherwise properly before them. *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950); *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561 (1946); *Switchmen's Union of North America* v. *So. Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). If the arbitrator can interpret the disputed contract provision in a manner that would render it lawful, arbitration is to be compelled. *John Wiley & Sons, Inc.*, 376 U.S. at 555. *See W.R. Grace & Co.* v. *Local 759, Rubber Workers*, 461 U.S. 757, 767-68 n.10 (1983).[15]

Delta's arguments against arbitration assume that the IBT will prevail at arbitration. But, an arbitrator may

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[15] Thus, even if Delta is correct in its assertions that representational issues are created by the successorship clauses, arbitration is not precluded. *Carey* v. *Westinghouse*, 375 U.S. 261 (1964). There, it could not be determined whether a grievance raised a jurisdictional or representational dispute. After considering *Whitehouse* v. *Illinois Central*, 349 U.S. 366 (1955), an RLA case it considered analogous, the Court held that "[e]ven if it is a representation matter, resort to arbitration may have a pervasive, curative effect . . . ." 375 U.S. at 272. Should the arbitrator's decision exceed the scope of his authority or be inconsistent with federal policy or law, judicial review is available. *W.R. Grace & Co.*, 461 U.S. at 766.

find no violation of the successorship provision at issue, thus avoiding the representation issues that Delta and Western allege might arise. This possible result is in and of itself a sufficient basis to direct arbitration. *See Whitehouse*, 349 U.S. at 373.

Nor would an arbitrator, in order to afford relief to the IBT, have to step into the "representational area exclusively reserved to the NMB," as stated by Delta. Pet. at 10. The arbitrator could find that Western violated the Letter of Agreement, and thereby sustain the Union's grievance, but he might interpret it as permitting only monetary damages. *See Allied Corp.*, 765 F.2d 412; *TTL Distribution Inc.*, 551 F. Supp. 649; *Martin Podany Associates*, 80 Lab. Arb. (BNA) at 663. A damage award could not implicate a representation issue within the NMB's exclusive jurisdiction.

Assuming the arbitrator ruled that the Letter of Agreement precluded an operational merger until Western caused Delta to agree to assume the labor agreements with the IBT, the award would be directed to Western only and would affect only Western's employees. If, after the award, Delta had decided not to assume the agreements, the IBT would have continued to represent only Western's employees, Western would have continued to operate separately from Delta, and no representation issue could have existed. *See Northwest Airlines, Inc.*, 13 N.M.B. 399, 401 (1986) (where two carriers' operations remain unintegrated, no representation issue arises). Delta's decision whether to assume the collective bargaining agreements because of concern over perceived operational difficulties or inefficiencies is an entrepreneurial decision for Delta to make, but is "irrelevant to the issue of arbitrability." *Royal Center, Inc.*, 796 F.2d at 1164. *See Whitehouse*, 349 U.S. at 373.

Assuming Delta decided the benefits of merging Western into its operations outweighed the disadvantages (from its standpoint) of assuming the IBT-Western

agreements, its assumption of the agreements would have amounted to no more than a voluntary recognition of the IBT as the postmerger representative of the employees represented by the Union at Western. Voluntary recognitions are permissible under the RLA. *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 548 n.6 (1936); *Summit Airlines, Inc.* v. *Teamsters Local 295*, 628 F.2d 787, 795 (2d Cir. 1980); *Burlington Northern* v. *ARSA*, 503 F.2d 58 (7th Cir), *cert. denied*, 421 U.S. 975 (1974); *Southwest Airlines*, 8 N.M.B. 684 (1981). Indeed, the NMB's stated policy is one of "noninterference in voluntary recognition matters, 'except where such recognition would be in derogation of an existing Board certification.'" *TWA/Ozark*, 14 N.M.B. 218, 234 (1987), *quoting Republic Airlines, Inc.*, 6 N.M.B. 817 (1979). Since Delta's employees were unrepresented, there was no certification in existence which could be derogated by Delta's voluntary recognition of the IBT.

Contrary to Delta's assertions, the recognition of a representative for less than all employees who might be included in a craft or class, does not violate any mandate contained in the RLA. Pet. 21-22. The NMB "has long held that carriers and labor organizations are free to include any employee classifications under a voluntary recognition agreement . . . ." *Aircal*, 14 N.M.B. 33, 42 (1986); *Galveston Wharves*, 4 N.M.B. 200 (1962). Thus, "[i]f the majority of a craft or class has not selected a representative, the carrier is free to make with anyone it pleases and *for any group it pleases* contracts establishing rates of pay, rules or working conditions" (emphasis added). *Virginian Ry.*, 300 U.S. at 548 n.6, quoting with approval the Government's position. *Accord, Burlington Northern*, 503 F.2d at 63.[16] The parties' volun-

[16] In *Burlington Northern*, the court of appeals held:

> Unless a representation determination is made [by the NMB] pursuant to that Act, the voluntary agreement by plaintiff to recognize a collective bargaining representative of a craft or

tary action, of course, would not affect the NMB's authority to designate a different craft or class for collective bargaining purposes if its authority is properly invoked by the filing of an application by an individual or organization alleging a representation dispute.[17] Delta's decision to voluntarily recognize the IBT for a group which does not comprise a systemwide craft or class would be permissible.

The NMB's decision in *TWA/Ozark*, 14 N.M.B. 218, and Delta's subsequent application for an order revoking the IBT's certification, do not demonstrate that arbitration of the successorship clause raises representation issues, or that the court of appeals was without jurisdiction to compel arbitration. The NMB's *TWA/Ozark* decision was a response to carrier abuse of the NMB's so-called "*Republic* merger doctrine."[18] The NMB recognized that:

> . . . carriers have interpreted the *Republic* case to give them independent authority to extinguish existing certifications held by organizations on the acquired carrier; to choose between recognition of organizations on its property or the acquired carrier;

> class that is not system-wide will be given effect. Compare *Switchmen's Union* v. *Nat'l Mediation Board*, 77 U.S. App. D.C. 264, 135 F.2d 785, 792 (1943), *rev'd on other grounds*, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61 (1943). If the contrary were true, the Merger Protection Agreement, which became effective, would have become a nullity upon its effective date, and the representation rights of ARSA would be terminated by the very agreement that purports to continue them in force.

503 F.2d at 63.

[17] *See generally, Flight Eng'rs Int'l Ass'n* v. *NMB*, 294 F.2d 905, 908 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962) (stating, "It has become well settled that in making 'craft or class' determinations, the NMB may regroup, amalgamate, or splinter 'historic' bargaining groups, taking into account technological and functional changes . . .").

[18] *Republic Airlines*, 8 N.M.B. 49 (1980).

> and to choose whether or not employees on the acquired carrier will be represented.

14 N.M.B. at 233.

It held that only the NMB could revoke a labor organization's certification. Carriers can invoke the NMB's services merely for the limited purpose of obtaining a determination of whether the Board should revoke a certification. *Id.* at 241-42.

Delta's application before the NMB cannot resolve the issue before this Court. The instant successorship issue must first be resolved for Delta's application to be ripe for resolution by the NMB. The NMB's decision whether to revoke a union's certification after a merger is fact based.[19] *TWA/Ozark*, 14 N.M.B. at 236; *Northwest Airlines*, 13 N.M.B. at 400. Where, as here, there exists an issue of contractual successorship rights, the NMB cannot revoke a union's certification without the prior resolution of the successorship issue, for this is tantamount to the Board's resolving the minor dispute on the merits. The NMB has no authority to enforce the successorship clause or determine its validity. *Pan American World Airways, Inc.*, 7 N.M.B. 225-26 (1979).[20] Arbitration of the successorship clause could result, *inter alia*, in the voluntary recognition of the IBT by Delta as the representative of former Western employees. A decision to revoke the IBT's certification prior to an arbitral resolution would interfere with a matter of voluntary recognition, which the NMB will not do, *TWA/*

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[19] A merger does not automatically cause a union's certification to terminate, contrary to Delta's assertion. Pet. at 9-10. *TWA/Ozark*, 14 N.M.B. at 235. TWA's flight attendants comprised over 90 percent of the postmerger class or craft, but TWA also voluntarily continued to recognize and treat with the Association of Flight Attendants, which represented Ozark's attendants. For this reason, the NMB determined that AFA's certification continued after the merger. Accordingly, TWA had two unions representing its flight attendants. *TWA/Ozark*, 14 N.M.B. at 238-40.

[20] *See NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

Ozark, 14 N.M.B. at 234, as well as preclude arbitration from running its full course.

No issue of representation is before the NMB. A carrier cannot invoke the NMB's procedures to initiate "employee voting." Pet. at 23. Section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth, restricts the NMB's authority to investigating representation disputes among employees, not disputes between the carrier and its employees. *Bhd. of Ry. Clerks* v. *Ass'n of Non-Contract Employees*, 380 U.S. 650, 666-67 (1965); *Int'l Ass'n of Machinists* v. *Alitalia Airlines*, 600 F. Supp. 268, 275 (S.D.N.Y. 1984), *aff'd*, 753 F.2d 3 (2d Cir. 1985). Nor may the NMB commence a representation investigation *sua sponte*. *Alitalia Airlines*, 600 F. Supp. at 275.

II. NO OTHER CIRCUIT COURT OF APPEALS HAS DECIDED WHETHER A DISPUTE ARISING UNDER A SUCCESSORSHIP CLAUSE IN AN RLA AGREEMENT IS ARBITRABLE, AND THEREFORE AN INTER-CIRCUIT CONFLICT CANNOT EXIST.

The Ninth Circuit Court of Appeals is the only court of appeals to decide the issue of whether a grievance over a successorship clause gives rise to an arbitrable minor dispute. Hence, the decision below does not conflict with rulings of any other Circuit Court of Appeals. No order declaring that the IBT was the appropriate bargaining representative of Delta's employees was sought or granted. The court of appeals did not direct the arbitrator to issue such an award; nor did it contemplate the issuance of such an award. Its order compelling arbitration presupposed no finding on the merits in accordance with this Court's longstanding precedents. *AT&T Technologies*, 106 S.Ct. at 1419; *Slocum*, 339 U.S. 239.

Air Line Employees Ass'n ("ALEA") v. *Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.), *cert. denied*, 107 S.Ct. 458 (1986), upon which Delta and Western pri-

marily rely, was an attempt by ALEA to obtain a judicial declaration that rival unions prospectively recognized by Northwest Airlines, the carrier "surviving" the merger with Republic, were not the lawful representatives of employees. Northwest recognized two unions as the representatives of its postmerger ground employee complement, thereby supplanting ALEA, which was the premerger representative of Republic's ground employees. ALEA challenged Northwest's actions, with which it had no contract, and, in doing so, called into question the identity of the appropriate representative of the ground employees. 798 F.2d at 968. Thus, ALEA's complaint *inter alia*, sought a declaration that Northwest had a duty to bargain with it "as the representative of the majority in the class or craft involved." 798 F.2d at 968.

In order to grant ALEA relief, including an order compelling Northwest to arbitrate the grievance filed over the recognition, the district court would have had to determine whether ALEA or the unions recognized by Northwest represented the postmerger employee complement. That determination, the court of appeals held, is reserved exclusively for the NMB under § 2, Ninth of the Act. As the court below stated in distinguishing the case, "[t]he court properly treated the case essentially as an attempt to secure a court order deciding which union should represent employees after the merger, and dismissed for lack of jurisdiction over representation matters. . . ." Pet. App. at A-8.

In contrast, the IBT has not filed a grievance against Delta, and made no demand, in either its grievance or its complaint, that the IBT be recognized by Delta as the postmerger representative of Delta's employees. Nor has Delta recognized a union as the representative of the postmerger employees formerly represented by the IBT at Western. Rather, the IBT has challenged Western's

breach of the Letter of Agreement, which gives rise to a minor dispute, by invoking its arbitral remedies against Western as the court below found.

Similarly, in *Int'l Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983), the union sought a declaratory judgment that its collective bargaining agreement with Texas International remained in force by operation of law after Texas International was merged into the larger Continental Airlines. The union's claim was not predicated on a successorship clause or any other contract provision. Unlike the instant case, no minor dispute was involved. 717 F.2d at 163-64. The distinction is of decisional significance. *See Air Line Pilots Ass'n* v. *Texas Int'l Airlines*, 567 F. Supp. 66.

Bhd. of Ry. and S.S. Clerks v. *United Airlines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964), is very similar to *Republic Airlines*. In *United*, unlike here, the representative of employees on Capital (the carrier that was merged into United) sued the *surviving* carrier, United, in an attempt to enforce the successorship clause of the Capital agreement. Thus, the union sought to require United to recognize the union as the representative of its employees, 325 F.2d at 577, and thereby have the Court settle the question of representation between rival unions brought about by the merger. Here, the IBT is attempting only to enforce its agreements with Western against Western. Delta's employees are in no way implicated.

Analysis of the two First Circuit Court of Appeals' decisions arising out of the Delta-Northeast Airlines merger establishes that they are in harmony with the decision below. In *Int'l Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972), the union brought suit against Northeast to obtain an order compelling Northeast to bargain with it over postmerger employee rights. It relied upon

a contract provision which required that "[i]n case of a consolidation or merger, representatives of the Company and the Union will meet without delay and negotiate for proper provisions for the protection of employees' seniority and other rights." *Id.* at 551. The appeals court found that a bargaining order based on the contract provision was not appropriate because the failure to bargain was a breach of contract, which generated an arbitrable minor dispute within the exclusive jurisdiction of the system board of adjustment. *Id.* at 554.[21] The court of appeals declined to state whether Delta might be required to bargain with the union over post-merger changes in working conditions. *Id.* at 560 n.17.

In the subsequent case, *Int'l Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976), relied upon by Delta, the union amended its complaint to seek an order compelling Delta to negotiate with it over seniority integration. Noting that the union was not the certified representative of Delta's employees, the appeals court would not compel Delta to bargain. To enter a bargaining order, it recognized, a determination that the union represented Delta's employees must first be made. But, the court of appeals also suggested that an order compelling Delta to arbitrate would be appropriate if there were grievance pro-

[21] The appeals court found no independent statutory duty under the RLA to compel Northeast to negotiate. In large part, this conclusion rested upon the Civil Aeronautics Board ("CAB") having been vested with exclusive authority to approve mergers and their terms. The CAB required the carriers to afford employee groups the right to negotiate seniority integration after the merger, which the court stated removed the issue from "the procedures of the RLA." *Id.* at 559-60. The CAB ceased to exist in December 1984, and the Department of Transportation ("DOT") assumed the authority to consider whether a merger is in the public interest. 49 U.S.C. § 1551(a)(7). DOT has uniformly refused to impose labor protective provisions on merging carriers, expressly leaving labor protection to collective bargaining. *See Delta-Western Acquisition Case*, DOT Order 86-12-30 (Dec. 11, 1986).

ceedings at Northeast outstanding, or Delta "refused to submit to a System Board of Adjustment resolution of particular disputes concerning the survival of rights under the Northeast collective bargaining agreements." *Id.* at 977-78.

Other cases relied upon by Delta are easily distinguished. In *Flight Eng'rs Int'l Ass'n* v. *Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963), the union sought to compel the carrier to recognize and bargain with it after the NMB had conducted an election and certified a rival union as bargaining representative for certain employees. *Air Line Pilots Ass'n* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981), involved an attempt to have a court declare a union the representative of a new carrier's employees, and to compel the carrier to bargain with it. *Order of R.R. Telegraphers, Division 14* v. *Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962), involved an intraunion dispute over who had the right to represent employees, the local union or its parent international union. Again, the disputes sought judicial resolution of the appropriate bargaining representative.

Delta also relies upon a summary order of the Court of Appeals for the District of Columbia, which denied a motion by the Association of Flight Attendants for an emergency motion to compel arbitration, as an indication that "the District of Columbia Circuit is likely to follow other circuits which have concluded that the NMB has exclusive jurisdiction." Pet. at 25. Considering that the order was issued without an opinion, Pet. App. J-1, in a factually dissimilar case,[22] it scarcely supports Delta's contention that review by this Court is warranted.

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[22] The decision of the district court in *Ass'n of Flight Attendants ("AFA")* v. *Western Air Lines, Inc.*, No. 87-0040 (D.D.C. Feb. 20, 1987) (Pet. App. K-1), does not lend support to Delta's cause. Although the decision also involved a successorship clause, AFA

III. THE DUTY TO ARBITRATE SUCCESSORSHIP CLAUSES PRESENTS NO ISSUE DETRIMENTAL TO THE AIR AND RAIL TRANSPORTATION INDUSTRIES.

Delta's primary basis for asserting an important question of federal law warranting review by the Court is that an air or rail carrier may be required to arbitrate successorship disputes with some of its unions but not all. That is an illusory issue. A carrier might have to arbitrate with the Teamsters but not the Flight Attendants; however, fragmentation of its work force will not result. The unions have separate contracts and discrete claims. Arbitration of a dispute does not cause irreparable harm to a carrier, as Delta seemingly pleads. *Whitehouse*, 349 U.S. at 373; *Graphic Communications Union* v. *Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985). Rather, arbitration before a system board of adjustment was established by Congress as the machinery "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein . . ." and it is "the duty of all carriers, their officers, agents, and employees to exert every reasonable effort . . . to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce." *Central Airlines*, 372 U.S. at 689, *quoting* § 2, 45 U.S.C. § 151a and § 2, First, 45 U.S.C. § 152, First.

Delta further asserts that "disruption" to the airline industry may result from arbitration, and that this "disruption" "is of national concern." The DOT, however, in considering whether LPP's should be imposed on a carrier, has repeatedly stated that even a strike by the carrier's employees in a merger situation "will not dis-

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apparently intended to seek an order from an arbitrator binding Delta to its bargaining agreements with Western, or to otherwise require Delta to take some unspecified action. Pet. App. at K-6. The IBT, however, sought an order directed only against Western.

rupt the transportation system" because "[w]ith deregulation, other carriers can move quickly to fill gaps in service." *Midway-Air Florida Acquisition Case*, DOT Order 85-6-33 at slip op. p. 6 (June 14, 1985). *See Delta-Western Acquisition Case*, DOT Order 86-12-30 (Dec. 11, 1986). This view has met with judicial approval. *Air Line Pilots Ass'n* v. *DOT*, 791 F.2d 172 (D.C. Cir. 1986); *Ind. Union of Flight Attendants* v. *DOT*, 803 F.2d 1029 (9th Cir. 1986). If DOT, the agency charged with determining if a merger is in the "public interest," 49 U.S.C. § 1378, does not view a strike as disruptive to the national transportation system, and thus contrary to the public interest, arbitration is clearly not going to cause devastating disruption to the national transportation system.

DOT has also held that labor protective provisions should be obtained through free collective bargaining. *Delta-Western Acquisition Case*, DOT Order 86-12-30 (Dec. 11, 1986). The IBT and Western negotiated, as DOT has suggested, a labor protective provision in the form of a successorship clause. It creates a guarantee of the continuation of all the employees' terms and conditions of employment, including access to and representation before a system board for resolution of, *inter alia*, disciplinary matters and disputes over all working conditions. No voluntarily assumed LPP confers this right. If carriers view successorship provisions as onerous or unlawful, they should not enter into them. That is the carriers' remedy, not judicial intrusion into the substance of private collective bargaining. *See UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 576 (1982).

No important question of federal law warranting resolution by this Court arises from the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

STATUTORY MATERIAL

Set forth below are Section 2, First and Section 204 of the Railway Labor Act, 45 U.S.C. §§ 152, First and 184.

Section 2, First of the Act states:

> First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 204 of the Act states:

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised

by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

The portions of the Labor-Management Relations Act, as amended, analagously involved in this case are Section 301, 29 U.S.C. § 185.

Section 301 states:

> (a) Suits for violation of contracts between an employer and a labor organization representing employes in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against

the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

APPENDIX B

SEPTEMBER 1, 1984
LETTER OF AGREEMENT

The September 1, 1984 Letter of Agreement between Western and the IBT states:

It is mutually agreed and understood between Western Airlines, Inc. and the International Brotherhood of Teamsters as follows:

In the event of an unfriendly takeover effort, as determined by the International Brotherhood of Teamsters, Western Airlines shall require the merging, consolidating, or acquiring carrier or other entity to assume the obligations of the IBT collective bargaining agreements. Notice of the existence of this Agreement shall be given any airline or other entity involved in a merger, consolidation, or acquisition with or of Western Airlines. Such notice shall be in writing with a copy to the Teamsters Airline Division. Western Airlines shall be liable to the Teamsters Airline Division and to the covered employees for all damages sustained as a result of such failure to require assumption of the terms of this Agreement, and the IBT collective bargaining agreements.

APPENDIX C

The arbitration provisions of the three IBT-Western collective bargaining agreements state in pertinent part:

BOARD OF ARBITRATION

(A) There is hereby established a Board of Arbitration, hereinafter called the Board, for the purpose of adjusting disputes or grievances of any employee or employees or disputes or grievances between the Company and the Union which may arise under the terms of this Agreement and which are properly submitted to it after all steps for settling disputes or grievances, as set forth in Article XV, have been exhausted, provided they are appealed within ten (10) days after last step decision of grievance procedure has been received, and provided that in grievance cases covered under Article XV(C), the Union may extend the time an additional ten (10) days by advising the Company in writing within the original ten-day appeal period.

(B) The Board of Arbitration shall, in part, consist of one (1) member selected by the Union and one (1) selected by the Company. They shall serve until their successors are appointed.

(C) In the event any dispute or grievance is properly appealed to the Board, the Company and Union members of the Board will, upon the request of either party, meet and attempt to select a third member. In case of discharge, such meeting will take place within ten (10) days of the date the case is appealed to the Board. In the event that the parties are unable to agree upon the third member within five (5) days, the parties will jointly request the Federal Mediation and Conciliation Service to provide a list of five (5) neutrals. The parties shall select one (1) neutral by alternately striking names from the list of five (5) neutrals. The order of striking shall be determined by lot for the first case in which a neutral

member is chosen under the provisions hereof and in subsequent cases, the parties shall alternate taking the first strike.

(D) Such Board of Arbitration shall hear and determine the dispute or controversy as promptly as possible and in all events within thirty (30) days and shall issue a finding and award a decision in writing. The decision of the majority of the Arbitration Board shall be final, binding and conclusive to the parties thereto. Such decision shall be within the scope and terms of this Agreement but shall not change any of its terms or conditions. The Board shall answer the question or questions submitted to it. All Arbitration Board hearings will be held at the place of dispute, unless mutually agreed elsewhere.

* * * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 3164

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Plaintiff,

v.

REPUBLIC AIRLINES, INC.,
Defendant.

NORTHWEST AIRLINES, INC.,
Defendant-Intervenor.

BENCH OPINION

Plaintiff is the Association of Flight Attendants, a labor organization which represents the flight attendants employed by defendant Republic Airlines, Inc. Republic Airlines, Inc. is a common carrier by air engaged in interstate commerce within the meaning of Section 201 of the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Republic employs approximately 2,400 flight attendants represented by AFA. Labor relations between the parties are governed by the Railway Labor Act.

At all times material to this case, Republic and AFA have been parties to a collective bargaining agreement, the Agreement of 1984, which is attached to the pleadings and made a part of the record in this case. This Agreement states, among other things, that the Company

shall provide the Association with provisions of any legally binding contract for a merger. The description of the possible merger or other transfer of assets or acquisitions or consolidations is set forth in Section 1.D. The Agreement further provides in Section 1.E. that in the event of a merger, acquisition, consolidation or purchase, the Company will provide labor protective provisions for the Republic flight attendants no less favorable than the labor protective provisions specified by the Civil Aeronautics Board in the Allegheny-Mohawk merger.

The Agreement is in full force and effect and provides in other sections, particularly Section 25.A, for a System Board of Adjustment which shall be known as the Republic Airlines Flight Attendant System Board of Adjustment. That Board has been created and it has jurisdiction over what are referred to by the parties and in the cases as minor disputes, that is to say, disputes concerning compliance with the contract provisions, among other things.

Section 25.E. specifically states that the Board shall consider any disputes properly submitted to it by the President of the Union or by designated representatives when such dispute has not been previously settled in accordance with the terms provided in the flight attendants' Agreement.

Exhibit A to the Complaint is a copy of the Allegheny-Mohawk labor protective provisions incorporated by reference into Section 1.E. of the Agreement quoted above.

On January 23, 1986, Republic and Northwest, Inc. entered into an agreement and plan of merger. Exhibit B to the Complaint is a copy of the merger agreement. Republic contends that Section 1.1 of the merger agreement constitutes its compliance with the requirements of the Agreement with the flight attendants to bind any successor to the terms and provisions of the labor agree-

ment between AFA and Republic. AFA contends that at all material times Republic has refused to carry out its obligations under Sections 1.D. and 1.E. of the Agreement.

On February 27, 1986, AFA filed a grievance over Republic's failure under Section 1.D. to bind Northwest to the Agreement and to provide AFA with the terms of the transaction between the carriers carrying out that obligation and under Section 1.E. to provide Allegheny-Mohawk labor protective provisions to the Republic flight attendants. Exhibit F to the Complaint is a copy of the grievance.

On February 27, 1986, AFA submitted this dispute to the Republic flight attendants Board of Adjustment for arbitration and requested that Republic arbitrate the dispute on the expedited basis. Exhibit G is a copy of this submission to the Board.

On March 20, 1986, Republic formally denied the grievance. On March 26, 1986, AFA resubmitted the grievance to the System Board. Republic has taken the position that there is no matter to be submitted to the System Board for arbitration and contends that, among other things, it has complied with the obligations of its labor agreement with the flight attendants, and AFA denies that.

At this point in time, even though there is a merger agreement in effect between Northwest and Republic, Republic continues to be an independent organization bound by its labor agreement with AFA. This dispute is a matter which is properly submitted to the System Board of Adjustment for a determination as to whether or not Republic has literally complied or actually complied with the terms of the Agreement. This is a matter subject to the jurisdiction of the System Board and clearly not a matter for determination by this Court.

This controversy does not, of course, entirely end with this conclusion either factually or legally because Republic contends that intertwined with the issue of contract compliance is the issue of representation and what will occur after the impending merger, assuming now for the purposes of this analysis that the merger will be approved as proposed by Republic and Northwest. In spite of the able representation of counsel, I do not believe that there is at the present time a question of representation after the merger before the court. The only question properly presented by the Complaint and in dispute is one of whether or not the action of Republic, not of Northwest, but of Republic, has been in compliance with the labor agreement between the Association and Republic Airlines. The court should not and need not reach out and consider whether or not the ordering of arbitration will somehow impact the representation of all of the flight attendants after the merger. That is not before me and as the parties so eloquently point out, it is not a matter for the courts in any event. It is perhaps a major dispute and one which is reserved for the National Mediation Board.

No support exists for defendants' argument that arbitration should be denied if this court believes AFA's grievance is without merit. As the Supreme Court recently stated:

> The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.

AT&T Technologies, Inc. v. Communications Workers of America, 106 S.Ct. 1415, 1419 (1986). Therefore, this court has no power to review the merits of AFA's grievance to see if it is substantial enough to "justify" arbitration.

The cases cited by defendants are clearly distinguishable. Most involved the very different issue of whether a dispute is "major" or "minor," a distinction of critical importance in determining such things as the proper forum and whether a court can issue an injunction to preserve the status quo. That distinction can depend on "whether the contention that the contract permits the disputed action is not obviously insubstantial." *Air Line Pilots Ass'n v. Northwest Airlines*, 444 F. Supp. 840-41 (D.Minn. 1977), *aff'd*, 570 F.2d 257 (8th Cir. 1978). *See also Local Lodge No. 1266, IAM v. Panoramic Corp.*, 668 F.2d 265, 284-85 (7th Cir. 1981) (injunction should issue when "the position [the union] will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor"). These cases cannot justify a judicial determination of the merits to decide whether arbitration should be ordered at all. The other cases cited involve attempts by a union to enforce its bargaining agreement after a merger. Since any court action after merger would in effect be a finding that the requesting union is the proper representative, some courts say that would conflict with the National Mediation Board's exclusive jurisdiction over representation disputes so a court should refrain from deciding such cases. *See International Brotherhood of Teamsters v. International Airlines, Inc.*, 717 F.2d 157, 161-62 (5th Cir. 1983). This case, however, presents a pre-merger dispute. AFA is still the representative of Republic's employees, so ordering arbitration will not resolve a representation dispute.

Accordingly, based upon my determination that the material facts with relation to the issue of a dispute

under the contract between and only between AFA and Republic are not in dispute, I do therefore order that summary judgment be granted and that an order be prepared, based upon the oral statement that I have made directing that Republic submit on an expedited basis to the jurisdiction of the System Board of Adjustment to resolve, by issuance of a final and binding award, the parties' dispute over Republic's asserted violations of Section 1.D. and 1.E. of the Agreement. This is the limited relief I grant and the plaintiff will draw an order which so states.

The question of retaining jurisdiction is open. I am not certain it is necessary to retain jurisdiction at this point in time. I want this to be a final order because I realize that either side may want to go to the Court of Appeals. Therefore, I will grant only limited relief. If you think further relief is or should have been granted, you can take that up in the Court of Appeals. My judgment at this point in time is that the Court should grant only such relief as is absolutely necessary to let the parties go forward with expedited arbitration on the limited issues of contract compliance. That will be the order, so please draw it and present it to me.

ENTER:

/s/ William T. Hart
United States District Judge

Dated: June 11, 1986

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 87-5657/5667
D.C. Nos. CV-86-7921-JMI
CV-86-8032
(Central California)

IBTCWHA, LOCAL UNION NO. 2702,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC., *et al.*,
Defendants-Appellees.

AIR TRANSPORT EMPLOYEES,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC.,
Defendant-Appellee.

ORDER

Before: GOODWIN, SCHROEDER, and POOLE, Circuit Judges.

The court's opinion in this case filed April 1, 1987 is amended as follows: the phrase beginning on page 11, line 4, of the slip opinion is changed to read "with the merger imminent and one party to the arbitration about to cease its independent existence, both parties assert that the district court will lose jurisdiction to enter an effective arbitration order if the merger takes place as presently planned."